CHEMICAL TREATMENT OF SEX OFFENDERS

Cheryllinn Gunning
I. INTRODUCTION

One of a parent's worst fears is that his or her child will be victimized by a child molester. Compounding these fears is a sense of frustration and outrage due to the seeming inability of the criminal justice system to protect society from repeat sex offenders who target children. Recently, several states have passed legislation allowing or directing state officials to impose treatment, sometimes referred to as chemical castration, on particular classes of sex offenders.¹ Several other states have attempted to pass similar legislation.² Such legislation raises multiple intricate issues including the efficacy of the treatment, the responsibilities of medical professionals implementing the provisions of the statutes, and the constitutionality of the statutes.

This comment addresses several of the legal and ethical issues surrounding state legislation that requires chemical treatment of sex offenders as a condition of their release from incarceration. The first section will set out basic information on chemical treatment of sexual deviance, the general efficacy of this treatment, and the efficacy of the treatment as it will likely be applied by the statutes in force. Some medical ethical issues implicated by the efficacy of the treatment will also be explored.

The second section will address two related issues of consent. Legal and ethical requirements for informed consent may raise several ethical and policy issues for medical professionals implementing statutory provisions. Consent may also affect a sex offender's ability to assert


²See e.g., N.M. Senate Bill 617 from the 43rd Legislature, first session, 1997. This bill, proposing chemical treatment as a condition of parole for persons convicted of criminal sexual penetration of children under 13 years of age, passed the Senate, but never made it out of committee in the House.
constitutional claims regarding chemical treatment. While many constitutional questions are implicated by these statutes, this comment will focus on the impact of consent on claims based on substantive due process and cruel and unusual punishment. Finally, this comment will explore general policy issues surrounding legislation authorizing chemical treatment for sex offenders.

II. EFFICACY OF CHEMICAL TREATMENT FOR SEXUAL DEVIANCE

Statutes authorizing chemical treatment of sex offenders may seek to punish or to treat sex offenders. These statutes were likely passed, in part, because of societal perceptions that the criminal justice system has failed to attain the goals of punishment through traditional methods such as incarceration. Society, in punishing criminals, seeks to serve several purposes. Among these are retribution, deterrence, incapacitation, and rehabilitation. Incarceration of sex offenders serves some, but not all, of the purposes of punishment. It certainly serves the purposes of retribution and incapacitation during the term of incarceration. Depriving the offender of his freedom not only punishes the offender in the classic retributive sense, but also prevents him from committing sex offenses on the general public during the term of his incarceration. Arguably, incarceration may also

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deter some sexually deviant behavior.\textsuperscript{5} However, there is little indication that incarceration alone serves any rehabilitative function for sex offenders.\textsuperscript{6}

In order to analyze legal and ethical issues surrounding legislation authorizing chemical treatment of sex offenders, it is important to understand the method of treatment and whether its effects give it the potential to achieve any of the legitimate goals of punishment or treatment. The various statutes must then be examined to determine if any of them will likely apply chemical treatment for sex offenders in a manner that will achieve these goals.

A. Chemical Treatment

Chemical treatment or chemical castration of sex offenders typically involves a weekly injection of the drug medroxyprogesterone acetate or MPA.\textsuperscript{7} This drug is marketed by Upjohn under the trade name Depo-Provera.\textsuperscript{8} MPA was initially approved by the FDA in the late 1950's for the treatment of women experiencing irregular uterine bleeding, amenorrhea, or threatened miscarriage.\textsuperscript{9}

\textsuperscript{5}Pamela K. Hicks, Commentary, \textit{Castration of Sexual Offenders: Legal and Ethical Issues}, 14 J. LEGAL MED. 641, 645, Dec. 1993.

\textsuperscript{6}Id. Some studies question whether recidivism rates of sex offenders are any higher than recidivism rates of other violent offenders. Beth Miller, \textit{A Review of Sex Offender Legislation} 7-SPG KAN. J.L. & PUB. POL’Y 40, Spring 1998. However, statistics indicate that child molesters repeat their offenses throughout their lifetime. Pamela K. Hicks, \textit{supra} at 644; William Winslade et al., \textit{Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment or Old Punishment?}, 51 SMU L. REV. 349, 359, Jan. - Feb. 1998.


\textsuperscript{9}Id.
The FDA withdrew approval of the drug in 1974 after studies on rhesus monkeys indicated a connection between the drug and endometrial cancer, and studies on beagles suggested a nexus between the drug and breast tumors.\footnote{Id.} The drug was approved again in 1992.\footnote{Id.} It is only indicated as a female contraceptive,\footnote{Id.} and is not approved specifically for treatment of sexual deviance.\footnote{Larry Helm Spalding, \textit{Florida's 1997 Chemical Castration Law: A Return to the Dark Ages}, 25 \textit{Fla. St. U. L. Rev.} 117, 122, Winter 1998.} However, because MPA has FDA approval, it is not considered an experimental drug and may be prescribed and used for unlabeled indications.\footnote{Id.}

MPA has general side effects that include weight gain, lethargy, cold sweats, hot flashes, nightmares, hypertension, elevated blood sugar, shortness of breath, headaches, abdominal pain, and dizziness.\footnote{Philip J. Henderson, supra at 655-656.} Studies also indicate it may increase the risk of developing osteoporosis.\footnote{Id.} When used in men to treat sexual deviance, it is given at a dose more than 43 times higher than the dose given to women for contraceptive purposes.\footnote{Id. at 656.} An additional side effect experience by men receiving MPA

\footnote{Id.}
is reduced testis size. The side effects of MPA are considered temporary and only continue so long as the drug is being administered.

MPA affects male sexual function by reducing the body's production of testosterone. It thereby decreases the sex drive. MPA also has a tranquilizing effect and reduces the ability of some men to elicit erotic imagery. However, one study found only half the men receiving treatment responded with decreased fantasies. MPA does not have similar effects on women. It neither decreases the sex drive nor impairs sexual fantasy.

MPA does not cause impotence in men. While spontaneous erection and ejaculation do not typically occur for men receiving MPA, these men can still experience erection and ejaculation when

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18 Id.

19 Beth Miller, supra at 367.

20 Larry Helm Spalding, supra at 122.

21 Id.

22 Daniel L. Icenogle, supra at 284.


26 Id.

27 Karen J. Rebish, supra at 518.
efforts are made toward those ends. While MPA causes infertility in women, it does not cause infertility in all men, and some men have fathered children while receiving MPA. However, it does impair fertility in most men by reducing sperm counts and sperm motility. There is also evidence that high doses of MPA produce atypical sperm which could cause fetal abnormalities if impregnation occurs.

B. Efficacy of Chemical Treatment of Sex Offenders

Whether chemical treatment of sex offenders is effective depends on what result is being sought. If chemical treatment is imposed to mete out further retributive punishment for sex offenses, it may be effective even if it does nothing to alter the offender’s criminal disposition or behavior. If the goal is to incapacitate offenders so that they are unable to commit future criminal sexual acts, the medical fact that MPA does not cause impotence indicates that chemical treatment will be ineffective toward this end. However, if chemical treatment is imposed to treat and rehabilitate offenders, it has the potential to achieve this result.

28 Id.

29 Daniel L. Icenogle, supra at 285.

30 Id.

31 Karen J. Rebish, supra at 517.

32 See, footnote 197, infra. A statute with an express purpose to mete out retributive punishment would more likely violate the Eighth Amendment ban on Cruel and Unusual Punishment.
Studies have shown MPA to be an effective treatment for some sexually deviant behaviors.\textsuperscript{33} However, it is not a panacea as it only works for a small subset of the total class of sex offenders.\textsuperscript{34} MPA is only effective in treating sexually deviant behavior in men.\textsuperscript{35} It has no effect on women other than as a contraceptive.\textsuperscript{36} Additionally, the effectiveness of treatment depends on the willingness of the offender to undergo treatment,\textsuperscript{37} and whether the offender fits into a category of offenders for whom MPA treatment is efficacious.\textsuperscript{38}

Sex offenders can be classified into four categories.\textsuperscript{39} These are not the traditional categories of offenders based on the type of behavior or offense committed.\textsuperscript{40} Rather, these are categories based on an offender's motivation to commit sexually deviant acts and his or her willingness to take responsibility for the act.\textsuperscript{41} Type I sex offenders do not take responsibility for the sex offense for which they were convicted.\textsuperscript{42} They either deny the commission of the act itself or deny that the act

\begin{itemize}
  \item \textsuperscript{33}William Winslade et al., \textit{supra} at 366-367.
  \item \textsuperscript{34}Jean Peters-Baker, \textit{Challenging Traditional Notions of Managing Sex Offenders: Prognosis is Lifetime Management}, 66 UMKC L. REV. 629, 646-647, Spring 1998.
  \item \textsuperscript{35}Recent Legislation, \textit{supra} at 800.
  \item \textsuperscript{36}\textit{Id}.
  \item \textsuperscript{37}Philip J. Henderson, \textit{supra} at 656
  \item \textsuperscript{38}\textit{Id}.
  \item \textsuperscript{39}Karen J. Rebish, \textit{supra} at 518-519.
  \item \textsuperscript{40}\textit{Id. But cf.} Jean Peters-Baker, \textit{supra} at 631-643. (profiling offenders based on traditional categories).
  \item \textsuperscript{41}Karen J. Rebish, \textit{supra} at 518-519.
  \item \textsuperscript{42}\textit{Id}.
\end{itemize}
was criminal in nature. Type II sex offenders admit the commission of the act and its criminal nature, but deny personal responsibility. Instead, they place responsibility outside themselves on non-sexual factors such as drugs, alcohol, or stress. Type III sex offenders are motivated to commit sex offenses by non-sexual factors. These offenders are violent and are motivated by anger or power. MPA is not effective in treating any of these three categories of sex offenders.

Type IV sex offenders do not deny their participation in sexually criminal or deviant acts and are motivated by sexual factors. These offenders fit the traditional mental health classification of paraphilia. They show a pattern of sexual arousal, erection, and ejaculation in response to a specific deviant fantasy or act. Only sex offenders fitting into this category can be effectively treated with MPA.
It is important to note that occurrence of a particular behavior such as child molestation does not make the actor a Type IV offender. A person who has committed a sex offense against a child may fit into any of the four categories. Furthermore, Type IV offenders may include sex offenders who are not child molesters.

Studies indicate that MPA treatment is only effective when the recipient of treatment is a willing participant in the treatment. MPA, by itself, does not cure paraphiliac tendencies or behaviors. It must be accompanied by some form of counseling or therapy. All effects of MPA are temporary. Without willing participation in therapy, sexually deviant behavior will likely return when use of MPA is discontinued. Additionally, an unwilling participant could conceivably engage in paraphiliac behavior during the course of treatment. As noted above, while MPA reduces overall sexual desire, it does not render a man impotent. One study showed only minimal reduction in sexual desire.

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53Philip J. Henderson, supra at 656-657.
54Id.
55Id.
56Id. at 656.
57Jean Peters-Baker, supra at 654-655.
58Id.
59Beth Miller, supra at 367.
60Philip J. Henderson, supra at 656.
61Karen J. Rebish, supra at 518.
62Id.
consensual sexual activities of men receiving MPA treatment.\textsuperscript{63} An unwilling participant can also counteract the effects of the MPA with steroid injections.\textsuperscript{64}

MPA is not an effective treatment for women who exhibit sexually deviant behavior.\textsuperscript{65} MPA only affects the fertility of women.\textsuperscript{66} It does not affect their sexual desire or behavior.\textsuperscript{67} While women are not a large class of the total group of sex offenders, they are convicted of sexual offenses against children in significant numbers.\textsuperscript{68} Women are reportedly involved in 5-14\% of child sexual abuse cases involving girls and 14-24\% of cases involving boys.\textsuperscript{69}

In summary, MPA treatment of sex offenders has been shown to be an effective tool for rehabilitating and treating some sexual deviance.\textsuperscript{70} However, it is only effective when used in conjunction with psychotherapy and close monitoring.\textsuperscript{71} In order to ensure compliance with and benefits from treatment, participants must be willing.\textsuperscript{72} MPA treatment is only effective for sex

\textsuperscript{63}Id.

\textsuperscript{64}Beth Miller, \textit{A Review of Sex Offender Legislation}, 7-SPG KAN. J.L. & PUB. POL’Y 40, 50, Spring 1998.

\textsuperscript{65}Philip J. Henderson, \textit{supra} at 672.

\textsuperscript{66}Id.

\textsuperscript{67}Recent Legislation, \textit{supra} at 801.

\textsuperscript{68}William Winslade et al., \textit{supra} at 362.

\textsuperscript{69}Id.

\textsuperscript{70}Id. at 366-367.

\textsuperscript{71}Jean Peters-Baker, \textit{supra} at 655.

\textsuperscript{72}Philip J. Henderson, \textit{supra} at 656.
offenders who are motivated to commit their offenses by sexual desire.\textsuperscript{73} It is not likely to alter the deviant sexual behavior of persons motivated by violence, power or anger.\textsuperscript{74} Nor is it likely to change patterns of behavior for persons who deny responsibility for their offenses.\textsuperscript{75} Finally, chemical treatment is only effective for male sex offenders.\textsuperscript{76}

C. Efficacy of Chemical Treatment as Applied under Various Statutes

Five states have passed statutes authorizing or mandating chemical treatment of various classes of sex offenders.\textsuperscript{77} California was the first to pass legislation in 1996. Georgia, Montana, Louisiana, and Florida each passed legislation in 1997. The efficacy of chemical treatment as it will likely be applied under each of these statutory schemes depends, again, on the result each legislature intended to obtain. If the intent of the legislation is purely retributive, the statute need only identify the class of persons on whom it seeks retribution and apply the method of punishment. If, on the other hand, the goal is rehabilitative, the efficacy of treatment as applied under a statute will depend on the persons selected to receive treatment, the willingness of these persons to undergo treatment, and the manner in which treatment is imposed. Each of the statutes differs on each of these factors affecting efficacy.

\textsuperscript{73}Karen J. Rebish, \textit{supra} at 518-519.

\textsuperscript{74}Id.

\textsuperscript{75}Id.

\textsuperscript{76}Recent Legislation, \textit{supra} at 800.

1. The class of sex offenders affected by each statute and the method of selecting individuals from the class.

As noted earlier, MPA is only effective in treating persons who are motivated by sexual desire and arousal to commit sexually deviant acts. Each statute applies chemical treatment to particular classes of sex offenders. Whether the chemical treatment will be effective under each depends on the class of offender included under the statute, and the method, if any, of selecting particular individuals from the class to receive treatment.

Florida applies its chemical treatment statute to any person committing a criminal act of sexual penetration regardless of the age of the victim, but does not apply the statute to persons having unlawful contact with minor children if the contact does not involve some form of sexual penetration. Because the statute does not include child molesters who might be motivated by sexual desire but who do not engage in some form of sexual penetration with their victims, many persons for whom chemical treatment might be effective will not be considered for treatment. Conversely, because the statute applies to any person who commits rape, it may consider chemical treatment for many offenders motivated by non-sexual factors for whom treatment will likely be ineffective. If the goal of chemical treatment for sex offenders is to rehabilitate all those who are amenable to treatment, this statute is under inclusive in identifying the class of persons who should be considered for receiving treatment.

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78Karen J. Rebish, supra at 518-519.

79FLA. STAT. ch. 794.0235.
The Florida statute provides for a method of selecting individuals from the class of offenders to identify appropriate candidates for treatment. In Florida, a person convicted of a second offense of sexual battery will be sentenced to receive chemical treatment if a court appointed medical expert determines that the defendant is an appropriate candidate for treatment. This contingency has the potential to ensure that chemical treatment is not imposed on persons for whom it will not be effective. If the screening process for appropriateness includes identification of an offender’s motivation in committing the offense and his recognition of personal responsibility, efficacy of treatment will be maximized within the class of persons considered for treatment. However, if the screening only involves a determination of medical appropriateness such as ensuring that the offender is male, the statute will impose chemical treatment on many people who will receive no benefit.

The California statute has no method for determining the appropriateness of treatment for individuals within the class of offenders identified to receive treatment. However, the statute does allow the Department of Corrections to discontinue treatment when it is determined to be no longer necessary. This clause may allow the Department to forego treatment of persons for whom it would be grossly inappropriate such as women. Nonetheless, the basic scheme under the California statute is to require all persons falling within the targeted class of offenders to undergo treatment as a condition of parole regardless of individual factors affecting likely effectiveness of treatment.

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80 Id.
81 Id.
82 Cal. Penal Code § 645.
83 Id.
The California statute requiring chemical treatment applies to all persons who commit any type of sexual offense against children under 13.\(^\text{84}\) If California is only concerned about preventing recidivism among persons who target children, the statute is not under inclusive in identifying the class of offenders affected by the statute. However, because all offenders within this class will be required to undergo treatment, the statute is over inclusive and MPA will be administered to persons for whom treatment will not be effective.

Georgia has two chemical treatment statutes that differ significantly, so they must be treated separately.\(^\text{85}\) The Georgia sentencing statute allows the court to consider chemical treatment for persons convicted of aggravated child molestation.\(^\text{86}\) Aggravated child molestation is defined as the doing of any immoral or indecent act to, with or in the presence of a child under 16 when the child is physically injured or the act involves sodomy.\(^\text{87}\) Persons who commit child molestation but do not commit an act of sodomy or cause physical injury to the child are not considered for chemical treatment under this statute.\(^\text{88}\) The sentencing statute thus excludes many persons who target children for sexual gratification and might benefit from chemical treatment.

The sentencing statute provides for selection of individuals appropriate for treatment from among those convicted of aggravated child molestation.\(^\text{89}\) MPA treatment will be included in the

\(^{84}\)Id.


\(^{87}\)Id.

\(^{88}\)Id.

\(^{89}\)Id.
sentence only if a psychiatric evaluation ascertains that treatment will be effective to alter the offender’s behavior. In this manner, the Georgia sentencing statute effectively assures that persons selected for treatment at the time of sentencing will be those who are likely to receive rehabilitative benefits from the treatment.

Conversely, Georgia’s parole statute allowing for MPA treatment has no method of selecting offenders who will benefit from treatment. The Georgia Board of Pardons and Paroles has discretion to impose MPA treatment as a condition of parole for persons convicted of aggravated child molestation or convicted a second time for child molestation. While the parole statute expands the class of offenders considered for treatment, it has a reduced potential for applying treatment to offenders who will most likely benefit from treatment. It is possible the Board might use their discretion to determine the appropriateness of treatment before including it as a parole condition. However, there is nothing in the statute requiring the Board to consider appropriateness when exercising its discretion.

Application of MPA treatment under the Georgia statutes has the potential to be effective in reducing recidivism and providing rehabilitation at the sentencing stage. However, treatment will often not be offered to offenders who are capable of receiving the rehabilitative benefit. Application of treatment at the parole stage has the potential of reaching more offenders who are likely to benefit from treatment, but will also apply treatment to many persons who will receive no benefit.

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90 Id.

91 GA. CODE ANN. § 42-9-44.2.

92 Id.
The Louisiana statute authorizing chemical treatment of sex offenders applies to all persons who have committed any form of rape, sexual battery, incest, or crimes against nature regardless of the age of the victim. The statute thus attempts to consider all potential appropriate candidates for MPA treatment. Louisiana provides for selection of individuals to receive chemical treatment from among the class. This selection is based on a determination of the effectiveness of MPA treatment for the individual. All sex offenders are required to undergo some form of treatment designed to effectively deter recidivism, reduce reincarceration, and protect the public. MPA treatment is among the treatment options. Treatment plans for each offender are based on a mental health evaluation.

Montana gives courts discretion to impose chemical treatment on persons convicted of sexual contact or intercourse with a child under 16 without consent, and incest with a child under 16. The class of offenders is broad and includes all persons who have targeted children as victims of sex offenses. The Montana statute authorizing MPA treatment of sex offenders resembles the California statute in that it applies to all offenders within the identified class and has no provision for

93LA. REV. STAT. ANN. § 15:538.
94Id.
95Id.
96Id.
97Id.
98Id.
99MONT. CODE ANN. § 45-5-512.
100Id.
selecting particular individuals based on factors affecting amenability to treatment.\textsuperscript{101} The Montana code differs in that MPA may be imposed at the discretion of the court, and courts are not required to impose a sentence of MPA treatment for any offender.\textsuperscript{102} Thus, there is potential for courts to self-impose a selection criteria that includes a determination of an individual's appropriateness for treatment based on the likely effectiveness of treatment. However, the statute does not require that individuals be selected based on their ability to benefit from treatment. Therefore, the Montana statute has a potential equal to California's to impose MPA treatment on persons for whom it will be ineffective.

2. Willingness

MPA treatment of sexually deviant behavior is most effective when the treatment participant is willing to undergo the treatment.\textsuperscript{103} Willingness is not defined in the literature. It might be co-extensive with consent. It might, however, be defined as a desire to participate in treatment and work toward rehabilitation by eliminating deviant sexual desires and behaviors.

Consent issues are addressed in the next section of this paper. To the extent willingness might be synonymous with consent, it is sufficient to state at this point that all of the statutes require some type of consent before an offender receives MPA treatment.\textsuperscript{104} However, an offender may consent

\textsuperscript{101}Id.

\textsuperscript{102}Id.

\textsuperscript{103}Philip J. Henderson, \textit{supra} at 656.

\textsuperscript{104}\textit{CAL. PENAL CODE} § 645; \textit{GA. CODE ANN.} §§ 16-6-4 & 42-9-44.2; \textit{FLA. STAT.} ch. 794.0235; \textit{MONT. CODE ANN.} § 45-5-512; \textit{LA. REV. STAT. ANN.} § 15:538. All of the statutes authorizing MPA treatment impose this treatment as a condition of parole either at the sentencing stage of criminal proceedings or at the time parole conditions are set by the parole board, and all of these states provide for conditional release on parole only when a prisoner has agreed to the
to treatment for reasons other than a particular willingness to rehabilitate or work toward that end. All of the chemical treatment statutes provide that the alternative to treatment is incarceration.\textsuperscript{105} Thus, an offender may be motivated to give consent by a desire to avoid incarceration and may have no desire to rehabilitate. If consent and willingness are mutually inclusive, and offenders need have no desire to rehabilitate in order to obtain benefits from treatment, all of the statutes in force assure that participants will be effectively treated to the extent willingness has an impact on efficacy.

On the other hand, if willingness to undergo treatment requires that a participant have a desire to receive treatment, it may be that no jurisdiction will provide effective treatment to the extent willingness affects efficacy. None of the chemical treatment laws expressly address the role of an offender to receive treatment as a criterion for treatment.\textsuperscript{106} The only statutes that may allow for some form of screening of potential participants based on this factor are those that require a determination of appropriateness before treatment is ordered. Thus, the California and Montana conditions of parole. See, \textit{Ex Parte} Peterson, 92 P.2d 890, 891 (Cal. 1939) (holding that consent by a prisoner is a prerequisite to a valid conditional pardon), Todd v. Florida Parole & Probation Commission, 410 So.2d 584, 585, 586 (Fla. Dist. Ct. App. 1982) (holding that the parole commission has authority to withhold parole if the parties are unable to agree to conditions of parole), Huff v. Aldredge, 14 S.E.2d 456, 458, 459 (Ga. 1941) (holding the Governor has authority to attach any condition to parole which is not illegal, immoral, or impossible of performance. Also holding that an unmet condition precedent for pardon renders the pardon inoperative.), Bancroft v. Louisiana Department of Corrections, 635 So.2d 738, 740 (La. Ct. App. 1994) (holding that a prisoner is not forced to accept parole, but chooses conditional release), \textit{In re} Hart, 399 P.2d 984, 985 (Mont. 1965) (holding that a prisoner is not required to accept parole if he or she does not wish to accept the conditions of parole).

\textsuperscript{105}CAL. PENAL CODE \S 645; GA. CODE ANN. \S\S 16-6-4 & 42-9-44.2; FLA. STAT. ch. 794.0235; MONT. CODE ANN. \S 45-5-512; LA. REV. STAT. ANN. \S 15:538.

\textsuperscript{106}CAL. PENAL CODE \S 645; GA. CODE ANN. \S\S 16-6-4 & 42-9-44.2; FLA. STAT. ch. 794.0235; MONT. CODE ANN. \S 45-5-512; LA. REV. STAT. ANN. \S 15:538.
statutes will apply chemical treatment to unwilling offenders. Florida, Louisiana, and Georgia, however, could potentially order treatment only for those offenders with a desire to rehabilitate if the criteria for appropriateness include willingness.

3. Manner of providing treatment

MPA treatment has been found to be effective for treating sexually deviant behavior only when accompanied by psychotherapeutic intervention. Thus, statutes requiring chemical treatment of sex offenders without requiring some form of counseling will likely be ineffective in rehabilitating or treating those offenders. In contrast, statutes identifying appropriate individuals for chemical treatment and requiring this be coupled with appropriate psychotherapeutic intervention will have a higher probability of achieving rehabilitative and treatment goals.

Only the Georgia statutes require counseling as a co-requisite of MPA treatment. This requirement is contained in both the sentencing and parole statutes. The Louisiana statute specifically allows an offender’s treatment plan to include behavioral intervention as well as MPA treatment. However, there is no requirement that any form of psychotherapy be given

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107\textit{CAL. PENAL CODE} § 645; \textit{MONT. CODE ANN.} § 45-5-512.

108\textit{GA. CODE ANN.} §§ 16-6-4 & 42-9-44.2; \textit{FLA. STAT. ch.} 794.0235; \textit{LA. REV. STAT. ANN.} § 15:538.

109Jean Peters-Baker, supra at 655.

110\textit{GA. CODE ANN.} §§ 16-6-4 & 42-9-44.2.

111\textit{Id.}

112\textit{LA. REV. STAT. ANN.} § 15:538.
simultaneously with the MPA treatment. The California, Florida, and Montana statutes do not even contain provisions that authorize a counseling requirement to accompany MPA treatment. Thus, Georgia has the highest probability of providing effective treatment to those among the selected class who are otherwise appropriate candidates for treatment. Other states are less likely to provide efficacious treatment or achieve effective rehabilitation of offenders even for those who are otherwise appropriate candidates for treatment.

D. Medical Ethical Issues Implicated by Potential Inefficacious Administration of Treatment

Based on the above analysis, it can be assumed that several states will authorize chemical treatment of sex offenders for whom treatment will have little if any chance of success. For instance, under the California and Montana statutes, it is likely some offenders who are motivated by power and violence will be required to receive MPA treatment as a condition of parole. MPA treatment will probably be ineffective in even preventing these offenders from committing new offenses during the course of treatment. Medical professionals administering MPA treatment under these statutes may be faced with an ethical dilemma if an offender presents him or herself for treatment and the medical professional is aware that treatment will be ineffective for the particular offender.

113 Id.


116 Beth Miller, supra at 53.
A medical doctor has no ethical duty to provide treatment at a patient’s request when the
doctor knows the treatment cannot achieve the results desired by the patient.117 This does not address
whether a doctor has an ethical obligation to refuse to administer treatment when the doctor knows
the treatment cannot be effective. This issue may be amplified by the fact that MPA treatment is
ultimately requested by the state. Does a doctor have an ethical duty to a sex offender patient to
refuse a government’s request to administer MPA treatment when the doctor knows treatment will
be ineffective? While a doctor does have an ethical obligation to respect the law,118 a doctor also has
a fiduciary duty to his or her patients which includes an obligation to act in the patient’s best
interests.119 It is reasonable to believe that many doctors faced with this dilemma would feel obligated
to refuse to administer MPA treatment.120

1997).

118 Id. at 29. (reprinting the 1997 AMA Principles of Medical Ethics).

119 See, Eckhardt v. Charter Hospital of Albuquerque, 953 P.2d 722 (N.M. Ct. App. 1997);
Keithley v. St. Joseph’s Hospital, 698 P.2d 435 (N.M. Ct. App. 1984); Cooper v. Curry, 589 P.2d
201 (N.M. Ct. App. 1979).

120 But See, Pamela K. Hicks, Commentary, Castration of Sexual Offenders: Legal and
Ethical Issues, 14 J. LEGAL MED. 641, 665-666, Dec. 1993. (noting that some doctors oppose
mandatory chemical treatment of sex offenders because it is ineffective, and others oppose it
because it they believe using medical procedures as criminal penalties is unethical. However,
some doctors advocate the use of mandatory chemical treatment of sex offenders because of a
perceived connection between testosterone levels and violence.)
III. ISSUES OF CONSENT

The matter of consent raises two distinct issues. First, informed consent of a patient is both a legal and ethical requirement that must be met before medical treatment may be administered.121 Secondly, consent to treatment that meets requirements for informed consent may be adequate as a waiver of individual constitutional rights and preclude an offender from asserting some otherwise valid constitutional claims.122

A. Informed Consent

Before a patient can receive any form of medical treatment, he or she must either give informed consent to treatment or be provided the requisite due process for forcible administration of medical treatment.123 All of the statutes authorizing the administration of MPA assume that offenders will consent to treatment as none provide for the individualized determinations necessary for forcible administration.
administration of the treatment. The principle of informed consent requires that a patient consent to treatment after being informed of what a reasonable person would need to know in order to make an informed and intelligent decision regarding the treatment. Several factors affect the validity of consent including the information given, the competency of the patient giving consent, and the voluntariness of the consent. Informed consent is absent when a patient has agreed to treatment but has not been given adequate information about the treatment. Even when a patient has been informed and has agreed to treatment, informed consent is lacking if the patient is not competent to make such a decision. It is also possible that consent is inadequate when a patient’s agreement to a treatment method is not made voluntarily.

1. Adequate Information

So long as offenders are given adequate information about MPA treatment prior to consenting to treatment, states can easily avoid any question of invalid consent based on inadequate information. Adequate information is given when a patient is informed of the nature of a treatment or procedure, the risks associated with it, the likely results of treatment, the risks associated with refusing treatment, and alternative methods of treatment. Thus, an offender would need to be given information about the effects and side effects of MPA, its efficacy or lack thereof in altering sexually deviant behavior,

124 See Footnote 104, supra.
126 JOHN L. DIAMOND ET AL., supra at 103.
127 BARRY R. FURROW, supra at 246.
129 See, Korman at 1145; Allan v Levy 846 P.2d 274 (Nev. 1993).
any alternative methods of treatment and the effectiveness of these alternatives, and the risks involved in refusing treatment which likely include continued incarceration or reincarceration for future criminally deviant behavior.

Not all of the statutory designs meet even the minimal requirement that offenders receive adequate information about the treatment before giving consent. The Georgia statutes require that an offender give actual informed consent.\textsuperscript{130} While Louisiana, Montana, and California require that an offender be informed of the effects and side effects of MPA treatment, there is no express requirement that an offender be given this information prior to giving consent to treatment.\textsuperscript{131} Further, there is no requirement that an offender receive information on alternatives to MPA treatment or risks associated with refusing treatment.\textsuperscript{132} The Florida statute does not contain any express requirement that an offender be given information about MPA treatment before his or her consent is obtained.\textsuperscript{133} While the lack of express statutory requirements for informed consent may not result in offenders consenting to treatment without receiving adequate information, it leaves open the possibility of such an occurrence.

2. Competence and Decisional Capacity

While it is relatively easy to assure that treatment is given only to persons who have received adequate information, avoiding the administration of MPA to persons who are unable to give valid

\textsuperscript{130}GA. CODE ANN. §§ 16-6-4 & 42-9-44.2.

\textsuperscript{131}CAL. PENAL CODE § 645; MONT. CODE ANN. § 45-5-512; LA. REV. STAT. ANN. § 15:538.

\textsuperscript{132}CAL. PENAL CODE § 645; MONT. CODE ANN. § 45-5-512; LA. REV. STAT. ANN. § 15:538.

\textsuperscript{133}FLA. STAT. ch. 794.0235.
consent due to a lack of competence or decisional capacity requires greater consideration of the
principles of informed consent. If a person is not competent to make a particular decision regarding
health care, that person’s agreement to a method of treatment does not constitute the requisite
informed consent even if that person has received a plethora of information about the treatment.\textsuperscript{134}

In the past, courts and medical professionals viewed the determination of a person’s ability
to make decisions as a question of competence.\textsuperscript{135} Persons who were deemed competent were seen
as having the ability to make any decision.\textsuperscript{136} Conversely, persons who were not competent were
incapable of making a decision under any circumstances.\textsuperscript{137} Courts and medical professionals are now
more likely to attempt to determine a person’s decisional capacity regarding a particular decision.\textsuperscript{138}
There are several methods of determining a person’s capacity to make specific decisions.\textsuperscript{139} The
method that most closely parallels the law in the area of informed consent\textsuperscript{140} and has been accepted
by the American Psychiatric Association\textsuperscript{141} requires that a patient have an ability to understand the

\textsuperscript{134}See, BARRY R. FURROW ET AL., supra at 246-247. See also, Harris v. Leader, 499
S.E.2d 374 (Ga. Ct. App. 1998) (stating the general rule that consent is valid so long as it is
obtained from someone of sound mind).

\textsuperscript{135}BARRY R. FURROW ET AL., supra at 247.

\textsuperscript{136}Id.

\textsuperscript{137}Id.

\textsuperscript{138}Id.

\textsuperscript{139}Id. at 248 and 250.

\textsuperscript{140}Id. at 248.

\textsuperscript{141}Pamela K. Hicks, supra at 650
information he or she is given regarding a method of treatment. Thus, if a patient is given adequate information about MPA treatment, but does not have an ability to understand that information, he or she cannot give adequate consent.

Under all of the current statutes, it is likely that some individuals who are not competent will fall into the class of persons considered for MPA treatment. Under several of the legislative schemes, these offenders might be required to agree to treatment as a condition of parole in spite of their inability to give valid consent. The MPA treatment laws in Georgia specifically require that an offender give informed consent to treatment. So long as these requirements are implemented in a manner that considers the decisional capacity of offenders, Georgia will avoid administering MPA to persons who cannot give valid consent because of a lack of decisional capacity. None of the other chemical treatment laws has a consent requirement that mitigates this potential hazard. However, those statutes that screen offenders for appropriateness to receive treatment might avert this pitfall if the screening process includes a confirmation of an offender's competence to give valid consent.

Thus, in addition to Georgia, Louisiana and Florida may assure that offenders receiving treatment have the decisional capacity to consent to treatment. None of the other statutes provides a method to assure that those who are treated have the decisional capacity to consent to treatment.

3. Voluntariness

None of the chemical castration statutes currently in force addresses the requirement that consent be voluntary. They all present an offender with a choice between accepting MPA treatment

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142 Id. See also, BARRY R. FURROW ET AL., supra at 250.

143 GA. CODE ANN. §§ 16-6-4 & 42-9-44.2.

144 LA. REV. STAT. ANN. § 15:538; FLA. STAT. ch. 794.0235.
on the one hand and incarceration on the other. Some appear more coercive than others. For example, in California, an offender who refuses MPA treatment will not receive parole and will serve the rest of his or her original sentence in prison. In Florida, an offender who refuses to comply with MPA treatment is guilty of a second degree felony for which he or she will be sentenced to additional years of incarceration.

It has been postulated that consent to MPA treatment in the face of the alternative incarceration is invalid because the threat of incarceration is a form of duress that renders the consent involuntary. There is strong support for the premise that consent to medical treatment must be free from imposition and undue influence in order to be valid. Issues of informed consent are typically raised in tort litigation under state law. Therefore, whether consent is invalidated by coercion, and whether a choice between incarceration and treatment constitutes coercion will be decided by each

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145 CAL. PENAL CODE § 645; GA. CODE ANN. §§ 16-6-4 & 42-9-44.2; FLA. STAT. ch. 794.0235; MONT. CODE ANN. § 45-5-512; LA. REV. STAT. ANN. § 15:538.

146 CAL. PENAL CODE § 645.

147 FLA. STAT. ch. 794.0235.

148 Pamela K. Hicks, supra at 650-653.

149 See, Canterbury v Spence, 464 F.2d 772 at 783 (D.C. Cir. 1972). ("... [C]onsent, to be efficacious, must be free from imposition upon the patient.").

Both the law of torts and the law of contracts also address issues of consent or agreement and its validity in light of coercion or duress. In both tort and contract law, physical duress invalidates consent and agreement. JOHN L. DIAMOND ET AL., supra at 35; E. ALLEN FARNSWORTH, CONTRACTS § 4.16 (2nd ed. 1990). Tort law rarely recognizes coercion other than actual physical threat as sufficient to negate consent. JOHN L. DIAMOND ET AL., supra at 35. Contract law, however, recognizes as improperly coercive a wider array of inducements including any type of threat that would independently constitute a tortious act and, under many circumstances, threats of criminal prosecution. E. ALLEN FARNSWORTH, supra § 4.17. Both tort and contract law, however, recognize that most consent and agreement come about due to situational pressures and are rarely completely voluntary. JOHN L. DIAMOND ET AL., supra at 35; E. ALLEN FARNSWORTH, supra § 4.16.
state as the issue arises. States addressing the issue may look to case law from other jurisdictions addressing similar issues.

Case law addressing the issue of voluntariness falls within three categories. One category addresses the issue of whether consent to a plea bargain is voluntary notwithstanding the coercive nature of the choices presented by a prosecutor. The second category of cases addresses the question of whether persons who are in state custody can give voluntary consent to medical procedures in spite of the possibility that custody is inherently coercive. A third category addresses the issue of the voluntariness of a person’s consent to a criminal sanction that involves a medical procedure.

a. Voluntariness of Consent to Plea Bargains

A convicted offender’s consent is not normally at issue in the sentencing phase of criminal proceedings because states do not generally offer sentencing options and need not obtain the consent of a convicted individual in order to impose a given sentence. However, a state must obtain a defendant’s consent to a plea bargain. Cases addressing undue influence by prosecutors and coercive circumstances during plea bargaining have generally found that prosecutors have not abused their discretion by threatening additional charges or harsher sentences in order to obtain a guilty plea from a defendant. Courts have generally found that a plea is not involuntary simply because it is induced by fear of harsher penalties. The Supreme Court has even held that a guilty plea is valid

150 Pamela K. Hicks, supra at 651

151 See, Parke, 506 U.S. at 28, 29.

152 Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“Imposition of . . . difficult choices is an inevitable and permissible attribute of any legitimate system which tolerates and encourages the negotiation of pleas.”).

153 Id. at 363.
when motivated by a desire to avoid the death penalty. The Court has, however, found it relevant that defendants faced with choices at the plea bargaining stage are represented by counsel. When a convicted offender is offered parole with the condition he or she accept MPA treatment, he or she will not have a right to counsel. This may be seen as significant in an analysis of the voluntariness of such an agreement.

b. Voluntariness of Consent in Coercive Environments

Cases addressing the voluntariness of consent to medical procedures in coercive environments such as prisons and mental institutions leave open the question whether such coercion renders consent invalid. On the one hand, there is case law suggesting that involuntarily committed persons cannot give valid consent. Conversely, there is case law indicating that a prisoner’s consent to a medical procedure is voluntary and valid even when the procedure is experimental and the prison environment

154 Brady v. United States, 397 U.S. 742, 751 (1970) (“We decline to hold . . . that a guilty plea is compelled and invalid . . . whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty . . .”)

155 Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.” Bordenkircher, 434 U.S. at 363 (citing Brady, 397 U.S. at 758).

156 Gagnon v. Scarpelli, 411 U.S. 778 (1973) (holding that a person convicted of a crime has no 6th Amendment right to counsel at proceedings, such as parole revocation hearings, when sentence has previously been imposed, but finding that a due process right to counsel might be attach if a liberty or property interest is at stake in the proceedings.), Greenholtz v Inmates, 439 U.S. 817 (1978) (finding that inmates have no property interest in a mere possibility of parole, so have no entitlement to due process protections for the granting or denial of parole).

157 Kaimowitz v Michigan Department of Mental Health, Civil Action No. 73- 19434-AW, Circuit Court for Wayne County, 42 U.S.L.W. 101 (1973) (Cited to in Bailey v. Lally, 481 F. Supp. 203 at 220 (D. Md. 1979)) (holding that an involuntarily committed patient in a mental health facility was incapable of giving voluntary consent to an experimental surgical procedure that posed significant risk and danger to the patient).
is unpleasant. Courts examining whether sex offenders are capable of giving voluntary consent to MPA treatment when faced with a choice between treatment and incarceration will likely give greater weight to cases involving prisoners than cases involving involuntarily committed patients in mental institutions because the issue of voluntariness in the latter cases is inextricably related to the issue of competence.

c. Voluntariness of Consent to a Medical Procedure as Part of a Criminal Sanction

There is one case that addresses the voluntariness of consent to a plea agreement involving a medical procedure. In Briley v. California, an accused child molester was offered a plea agreement in which he was allowed to plead guilty to a lesser offense than that with which he was charged if he consented to surgical castration. Several years after the surgical procedure, the recipient began experiencing adverse side effects. He brought a civil action against the State of California alleging that he had been coerced into giving consent for the procedure. The court held that a trial judge had improperly dismissed the complaint and that the recipient of the castration had stated a valid claim. However, the court also found that the State of California would be immune from liability if the prosecutor were found to have had statutory authority to offer the plea conditioned on surgical castration. A court addressing the voluntariness of a sex offender’s consent

158 Bailey v. Lally, 481 F. Supp. 203, 221 (D. Md. 1979) (distinguishing Kaimowitz and holding that the consent of inmates to participate in medical research was voluntary because prisoners had a viable choice whether or not to participate, and unpleasant aspects of institutional life did not coerce the consent).

159 564 F.2d 849 (9th Cir. 1977).

160 Id. at 859.

161 Id. at 858.
to MPA treatment may find this case only minimally informative on the issue of consent. If anything, it implies that a valid claim of coercion rests on official misconduct which will not be found when there is statutory authority for the conduct.

d. Summary of Voluntariness to MPA Treatment

A state addressing the issue of whether a sex offender’s agreement to parole conditioned on MPA treatment is valid consent or invalid based on coercive circumstances will likely consider all the elements weighed in the above cases. Courts may start with a threshold assumption that the consent is valid based on cases holding plea agreements valid in spite of defendants being given difficult choices. A court may distinguish case law which holds that involuntarily committed patients in mental health facilities cannot give valid consent by noting likely differences in decisional capacity between prisoners and mental health patients. Further, a court may find that MPA treatment does not pose a significant risk or danger to recipients and may find germane the fact that MPA treatment is authorized by statute. Weighed against these factors will be other considerations. For instance, a court may find it quite relevant that most prisoners will not have the benefit of counsel when considering the conditions of their parole. It may also be found pertinent that consent to MPA treatment is a requisite to release from incarceration.

4. Medical Professional Ethics and Valid Consent

Even if state courts find the consent to MPA treatment legally valid under these statutes, there is still the possibility that medical professionals will believe the consent is invalid from an ethical perspective. A medical doctor is ordinarily required to obtain the informed consent of a patient

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162 See, Bailey 481 F. Supp. at 221.
before providing treatment or performing a medical procedure.\textsuperscript{163} Failure to secure this consent may give rise to a tort claim for negligence or even intentional battery.\textsuperscript{164} Consent also implicates a doctor’s fiduciary duty to his or her patients\textsuperscript{165} and general principles of medical ethics.\textsuperscript{166} The ethical responsibilities of a doctor include respect for human dignity, honesty with patients, and respect for the rights of patients.\textsuperscript{167} The fiduciary relationship between a doctor and patient implies a responsibility on the part of the doctor to act for a patient’s benefit and is the highest standard of duty implied by law.\textsuperscript{168}

The medical profession has long recognized that voluntariness is an important component of consent. The Nuremberg Code, promulgated by the Nuremberg court after World War II, stated that subjects of medical experiments must give voluntary consent which is not obtained through duress, overreaching, constraint, or coercion.\textsuperscript{169} The medical profession is also aware that prisoners are a vulnerable class of persons whose capability to give voluntary consent is suspect. Federal regulations on research involving human subjects take note of this vulnerability.\textsuperscript{170} While MPA treatment is not experimental, thus does not have to meet the criteria for research on human subjects, the guidelines

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\begin{itemize}
\item \textsuperscript{163}JOHN L. DIAMOND ET AL., \textit{supra} at 103.
\item \textsuperscript{164}Id.
\item \textsuperscript{165}See, footnote 119, \textit{infra}.
\item \textsuperscript{166}BARRY R. FURROW ET AL., \textit{supra} at 29-30.
\item \textsuperscript{167}Id.
\item \textsuperscript{168}BLACK’S LAW DICTIONARY 431 (abr. 6th ed. 1991).
\item \textsuperscript{169}BARRY R. FURROW ET AL., \textit{supra} at 379.
\item \textsuperscript{170}45 C.F.R. Part 46 Sec. 46.111(3) (1998).
\end{itemize}
set forth in the Nuremberg Code and federal regulations evidence a long-standing awareness that voluntariness is an ethically required component of consent.

In addition to ethical dilemmas surrounding the voluntariness of consent, medical professionals will likely have ethical issues with the administration of MPA to specific offenders whose competency to give valid consent is questionable. They may also find it unethical to administer MPA treatment to offenders whose consent was not preceded by information regarding the treatment. Notwithstanding the provisions of any statute, doctors have an independent responsibility to ensure that valid and adequate consent has been obtained from patients.171

Most of the statutes authorizing MPA treatment of sex offenders contain provisions that indicate legislative awareness of potential legal and ethical difficulties surrounding implementation of these statutes. The California and Montana statutes provide that no doctor employed by the state can be required to administer MPA treatment against her or his will.172 The Georgia and Louisiana statutes provide immunity from civil and criminal liability for doctors administering MPA treatment under provisions of those statutes.173 It is worth noting that these legislative bodies have chosen to protect medical professionals from the consequences of potentially invalid consent but have not opted to maximize the likelihood of valid consent by designing statutory provisions that take full account of all the factors affecting the validity of consent.

171 This responsibility has also been long recognized. See, BARRY R. FURROW ET AL., supra at 379 (printing The Nuremberg Code which provides that the duty to determine the quality of consent is a personal responsibility that cannot be delegated).

172 CAL. PENAL CODE § 645; MONT. CODE ANN. § 45-5-512.

173 GA. CODE ANN. §§ 16-6-4 & 42-9-44.2; LA. REV. STAT. ANN. § 15:538.
B. Impact of Consent on Possible Constitutional Claims

As noted above, none of the statutes authorizing chemical treatment of sex offenders permit treatment to be forcibly administered. Sex offenders will give some level of consent before MPA treatment begins even if this consent is merely an agreement to the conditions of parole. This consent may affect an offender’s ability to challenge MPA treatment on constitutional grounds. Persons have the ability to waive some of their constitutional rights. Whether consent to MPA treatment is sufficient to waive a constitutional claim depends on whether the consent meets the requirements of an adequate waiver of constitutional rights and whether a particular constitutional right or claim may be waived.

1. Standard for Waiving Constitutional Rights

The Supreme Court has held that constitutional rights may be waived if the waiver is made voluntarily and intelligently. The Court has also required a waiver be made competently. This standard closely parallels the standard for informed consent. Thus, if a sex offender’s consent to receive MPA treatment is deemed valid, it may also serve as a waiver of some, if not all, possible constitutional claims an offender might have regarding the MPA treatment.

It may be that the standard for waiving a constitutional right is higher than the standard for informed consent. The Court has stated that there must be evidence a person has intentionally

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174 See, Parke, 506 U.S. at 28, 29; Godinez, 509 U.S. at 396.

175 See, Parke, 506 U.S. at 29.

176 See, Godinez, 509 U.S. at 396.

177 Bailey v. Lally, 481 F. Supp. 203 (D. Md. 1979) (finding, without addressing the issue of waiver, that prisoners’ constitutional rights to privacy had not been violated because the prisoners had given informed consent to participate in medical research.).
abandoned a right in order for a waiver of that right to be effective. The Court has also required that a waiver of constitutional rights be clear. Additionally, there is a strong presumption against waiver of constitutional rights. If there is a higher standard for waiver of constitutional rights, it is possible a sex offender could give valid consent to MPA treatment without waiving any potential constitutional claims as a result. If the consent to treatment were not a clear and intentional abandonment of constitutional rights, it would not meet such a higher standard.

2. Waiver of Particular Constitutional Rights

Even if valid consent to treatment would also be a valid waiver of constitutional rights, it is likely it would not waive all possible constitutional claims. It is probable that a sex offender could waive his or her liberty interests protected under the Fourteenth Amendment Due Process Clause. It is less likely, however, that an individual will be found to have the ability to waive any claim he or she might have under the Eighth Amendment ban on cruel and unusual punishment.

178 Broookhart v. Janis, 384 U.S. 1, 4 (1966) (stating that a waiver of the right to confront witnesses against oneself must evidence an intentional relinquishment or abandonment of a known right or privilege).

179 Fuentes v. Shevin, 407 U.S. 67, 95 (1972) (stating a waiver of constitutional rights, even in a civil context, must be clear).

180 The Court in Brookhart stated, “There is a presumption against the waiver of constitutional rights.” 384 U.S. at 4.

181 Equal protection analysis and substantive due process analysis are often used as alternative means of determining whether a law impermissibly impairs an individual constitutional right JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.7 (5th ed. 1995). Thus a valid waiver of a liberty interest should waive any claim an offender might have under both the Due Process Clause and the Equal Protection Clause.

182 State v Brown, 326 S.E.2d 410, 411, 412 (S.C. 1985) (holding that protection from cruel and unusual punishment under the state constitution of South Carolina cannot be waived because such punishment is against public policy).
a. Waiver of Liberty Interests Protected Under the Fourteenth Amendment

The Fourteenth Amendment reads in part, “No state shall . . . deprive any person of life, liberty, or property without due process of law.”\textsuperscript{183} Deprivation is defined as the taking away or confiscation of a right.\textsuperscript{184} At the heart of the Fourteenth Amendment is the protection of individual autonomy and choice-making. Thus, if a person freely and autonomously chooses to accept a government action upon him or her, that person’s rights have not been violated.

The Supreme Court has recognized the protection of fundamental privacy rights under the Fourteenth Amendment. The Court has specifically included interests in the right to marry, to have children, to direct the education and rearing of one’s children, to marital privacy, to the use of contraception, to bodily integrity, and to abortion as among those protected under the Fourteenth Amendment.\textsuperscript{185} A sex offender required to receive chemical treatment could easily argue that a state

\textsuperscript{183}U.S. CONST. amend. XIV, § 1.

\textsuperscript{184}BLACK’S LAW DICTIONARY 304 (abr. 6th ed. 1991). As a logical deduction, something which can be taken can also be given up freely, and something which is given up has not been taken. See, Overmyer Co., Inc. v. Frick Company, 405 U.S. 174, 185 (1972) (stating that procedural due process rights may be waived in a civil context). See also, Reno v Flores, 507 U.S. 292, 309 (1993) (holding that juvenile aliens may waive their due process rights to a hearing before an immigration judge).

\textsuperscript{185}Washington v Glucksberg, 117 S.Ct. 2258, 2267 (1997) (finding that the Due Process Clause protects these fundamental liberties against governmental interference). Paul v Davis, 424 U.S. 693, 713 (1976)(holding that states’ powers to regulate individual conduct in these areas are limited by concepts of liberty found in the Fourteenth Amendment).

An expansive reading of the Court’s decisions might indicate a willingness on the part of the Court to protect a broad range of privacy interests including a general right to sexual identity. See, Romer v Evans, 517 U.S. 620, 635 (1996) (holding that a Colorado law forbidding enactment of protections for homosexuals as a class violated the Equal Protection Clause of the Fourteenth Amendment). However, the Court has recently indicated a reluctance to expand the privacy interests protected by the Fourteenth Amendment. See, Glucksberg, 117 S.Ct. 2258, 2267 (holding that protected privacy rights do not include a right to die, and stating, “we have
had interfered with his or her liberty interest in a marital relationship, procreation, or bodily integrity. However, because the policy underlying the Fourteenth Amendment is essentially the protection of individual autonomy, if an offender gives valid informed consent to chemical treatment, it is likely he or she will be seen as having waived any constitutional rights protected under the Amendment.186

b. Waiver of Rights Under the Eighth Amendment Ban on Cruel and Unusual Punishment

Whether a person may waive his or her right to be free from cruel and unusual punishment187 is an issue that has not been raised under the federal constitution.188 A federal court faced with this issue would reasonably consider the policy implications of allowing an individual to waive protections under the ban on cruel and unusual punishment. The Supreme Court has addressed policy always been reluctant to expand the concept of substantive due process .

186 This comment does not attempt a full analysis of a Fourteenth Amendment claim arising from statutes authorizing chemical treatment of sex offenders. Such analysis can be found in several law review articles including Kris W. Druhm, supra; Daniel L Icenogle, supra; Karen J. Rebish, supra; Recent Legislation, supra; Beth Miller, supra; Larry Helm Spalding, supra; William Winslade et al., supra; Bryan Keene, Note, Chemical Castration: An Analysis of Florida’s New “Cutting Edge” Policy Towards Sex Criminals, 49 FLA. L. REV. 803, Dec. 1997; Kimberly A. Peters, Comment, Chemical Castration: An Alternative to Incarceration, 31 DUQ. L. REV. 307, Winter 1993; Kay-Frances Brody, Comment, A Constitutional Analysis of California’s Chemical Castration Statute, 7 TEMP. POL & CIV. RTS. L. REV. 141, Fall 1997; Jason O. Runckel, Comment, Abuse it and Lose it: A Look at California’s Mandatory Chemical Castration Law, 28 PAC. L.J. 547, Spring 1997.

187 U.S. CONST. amend. VIII reads, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

188 But see, Gilmore v Utah, 429 U.S. 1012 (1976) in which the mother of a death row inmate was held to have no standing to bring a claim of cruel and unusual punishment when the inmate was found to have knowingly and intelligently waived any rights he might have asserted following sentencing. Justice White, joined in dissent by Justices Brennan and Marshall, stated that, “[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.” Id. at 1018.
considerations regarding waiver of individual rights and stated that a waiver which substantially impairs the policy underlying those rights may be unenforceable.\textsuperscript{189}

In his opinion in \textit{Trop v. Dulles},\textsuperscript{190} Chief Justice Warren stated that, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."\textsuperscript{191} The Eighth Amendment, then, protects more than individual rights. It protects society itself from its own potential to become uncivilized. It protects humanity and the dignity of humankind. If a sex offender were able to consent to punishment that was cruel and unusual, this would undermine the societal protections inherent in the Eighth Amendment. Thus, if

\textsuperscript{189}Town of Newton v. Rumery, 480 U.S. 386, 392 & n.2 (1987) (deciding that a defendant could be required to waive a right to sue under federal statute as a condition of the dismissal of criminal charges. The Court did hypothesize that a waiver that substantially impaired the policies underlying the right would be unenforceable. In this case, the Court looked to contract law for the basic common law principle that an agreement that would harm public policy in its enforcement is unenforceable).

\textsuperscript{190}356 U.S. 86 (1958) (plurality opinion).

\textsuperscript{191}Id. at 100, 101.
state imposed chemical treatment of sex offenders were found to be cruel and unusual punishment\textsuperscript{192}, an order for such treatment would be invalid despite the consent of the offender.\textsuperscript{193}

IV. POLICY ISSUES SURROUNDING LEGISLATION FOR CHEMICAL TREATMENT OF SEX OFFENDERS

As previously noted, each of the current statutes in force that authorize chemical treatment of sex offenders has limitations regarding the effectiveness of treatment. Additionally, most of the legislation could be attacked on Eighth Amendment\textsuperscript{194} and Fourteenth Amendment grounds.\textsuperscript{195} However, MPA treatment can be an effective means of rehabilitation for many sex offenders. It

\textsuperscript{192}The threshold inquiry is whether chemical treatment is punishment. It must be either punitive in purpose or effect. \textit{See}, Trop v Dulles, 356 U.S. 86 (1968) (plurality opinion) (stating that whether a law is penal in nature is dependant upon the purpose of the statute); Kennedy v Mendoza-Martinez, 372 U.S. 144 (1963) (Considering seven factors to determine whether a sanction is punitive in effect absent conclusive evidence of a legislative purpose to punish: whether the sanction imposes a disability or restraint, whether it has historically been viewed as punitive, whether it has retributive or deterrent effects, whether the behavior to which it applies is criminal, whether it can be rationally related to an alternative purpose, and whether it is excessive in relation to any alternative purpose). If a sanction is determined to be punitive, it will violate the Eighth Amendment if it is found to be cruel and unusual. The Supreme Court has held that the Eighth Amendment prohibits both barbaric punishments and those that are disproportionate to the crime committed. \textit{See}, Solem v Helm, 463 U.S. 277, 284 (1983) (using a three part test for proportionality by examining the gravity of the offense and the harshness of the penalty, comparing the sentences imposed on other criminals in the same jurisdiction, and comparing the sentences imposed for the same crime in other jurisdictions). \textit{But see}, Harmelin v Michigan, 501 U.S. 957, (1991) (with six justices agreeing in various opinions that proportionality was required in non-capital cases, but not agreeing on a test for proportionality outside the context of the death penalty).


\textsuperscript{193} \textit{But see}, Gilmore 429 U.S. at 1012.

\textsuperscript{194} \textit{See}, footnote 194, \textit{supra}, and accompanying text.

\textsuperscript{195} \textit{See}, footnotes 186-188, \textit{supra}, and accompanying text.
would seem, then, that MPA treatment should be made available to those who will benefit from its effects. The primary policy concern is whether there is a method of making this treatment available in a manner that maximizes the treatment benefits without violating the civil rights of convicted sex offenders.

The Texas legislature passed a statute in 1997 authorizing the state to provide an orchiectomy, or surgical castration, to persons convicted of sexual offenses. Under this statute, a sex offender may only undergo this procedure if he does so voluntarily, and there are multiple safeguards to assure voluntariness and appropriateness of the procedure. The voluntariness of the procedure guarantees that it will not violate a convicted sex offender’s Fourteenth Amendment Due Process rights. The voluntariness of the procedure also precludes a finding that the statute is punitive, thus excluding the possibility of violating the Eighth Amendment ban on cruel and unusual punishment. This statute may do little, if anything, however, to satisfy societal concerns regarding

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197 The statute requires that an offender have been convicted at least twice of sexual offenses, be over 21 years of age, request the procedure in writing, receive counseling and a psychiatric or psychological evaluation, and give informed, written consent. A special monitor is required to advise an inmate to withdraw the request if the monitor perceives the request was in any way coerced. The inmate may withdraw the request at any time prior to the procedure, and an inmate who has once requested the procedure and subsequently withdrawn the request is ineligible to receive the procedure in the future. Id. Additionally, a judge is not permitted to require the procedure as a condition of community supervision. TEX. CRIM. P. CODE § 42.12(11)(f) (West 1998). Nor may a judge or jury be made aware of a defendant’s plans to undergo an orchiectomy prior to sentencing that defendant. TEX. CRIM. P. CODE § 37.07(3)(h) (West1998).

198 See, footnotes 185-188, supra, and accompanying text regarding consent and waiver of Fourteenth Amendment constitutional rights.

199 See, footnote 194, supra, regarding the Supreme Court’s interpretation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.
long-term incapacitation of sex offenders. Because it provides no incentives for an offender to select surgical castration, it is not likely to be implemented by large numbers of offenders and will have little effect on recidivism rates in Texas. Therefore, it may not be the model upon which to base a statute authorizing chemical treatment for sex offenders.

A model statute would combine some of the aspects of the Texas statute, all the best features of several of the statutes in force authorizing chemical treatment of sex offenders, and some additional components to provide chemical treatment as one option for sex offenders. As a first step, such a statute would need to allow chemical treatment for any convicted sex offender, regardless of the age of the victim, or the type of sexual offense. In this respect, such a statute would most closely resemble the current statute in Florida.  

A model statute should require an individualized treatment plan for each offender that attempts to provide some method of treatment likely to reduce recidivism. In this, the statute would resemble that of Louisiana. However, a model statute would include provisions ensuring an offender’s fully informed and voluntary consent to any treatment recommendations. Such a statute would also guarantee that chemical treatment was accompanied by counseling. Finally, such a statute would incorporate terms for identifying persons appropriate for chemical treatment that would maximize the effective use of chemical treatment given the individual for whom it was being considered. As noted previously, only sexual offenders who acknowledge responsibility for sexually deviant behavior and who are motivated by sexual desire are amenable to chemical treatment.  


202 Karen J. Rebish, supra at 518-519.
Thus, a model statute would assess each individual offender to determine his appropriateness for chemical treatment.

A model statute authorizing chemical treatment for sex offenders would need to strike a balance in offering incentives for sex offenders to choose chemical treatment. On the one hand, a lack of incentives, as there are in the Texas statute authorizing surgical castration\textsuperscript{203}, renders a statute ineffective in having any real impact on recidivism. On the other hand, incentives that are overly attractive, such as offering chemical treatment as the only alternative to life in prison without parole, may rise to the level of coercion. A model statute would allow a board of parole to consider the individualized treatment plan for an offender and the recommendations of professionals regarding the potential success of the offender in treatment when deciding whether to grant parole and when setting the conditions of parole. Such a statute would set guidelines indicating that offenders should be granted parole only if they have been found amenable, to some extent, to some form of treatment. Further, such a statute could state that parole should be granted only when the persons developing the treatment plan with the offender believe he or she has selected a treatment method with some potential to alter deviant sexual behavior. A model statute would also authorize the state to pay for the costs of a treatment plan when an offender has agreed to the form of treatment to which he or she has been found to be most amenable.\textsuperscript{204} Finally, a model statute would provide an offender with legal counsel when making final decisions regarding their individual treatment plan to assure the offender is aware of all of his or her rights and the legal ramifications of any decision made.

\textsuperscript{203}TEX. GOV'T CODE ANN. § 501.061.

\textsuperscript{204}Most statutes require an offender to pay all costs of his or her parole, including the costs of chemical treatment. \textit{See e.g.}, LA. REV. STAT. ANN. § 15:538.
Chemical treatment with medroxyprogesterone acetate can have a positive influence on the deviant sexual behavior of some sex offenders. For this reason, statutes authorizing this treatment for offenders who fall within the category of persons who are able to benefit from treatment can be advantageous for both sex offenders and the society in which they will live following incarceration. However, statutes that mandate chemical treatment as a condition of probation for all sex offenders can do more harm than good. Among the problems already considered in this comment are ineffective treatment, questions regarding the constitutionality of such statutes, potential liability for administering treatment absent informed consent, and potential ethical concerns of physicians regarding the administration of treatment either because of a lack of efficacy or lack of valid consent. Several authors have pointed out that such statutes may also cause harm by giving society a false sense of security because people will have a tendency to believe offenders have been incapacitated by administration of MPA when, in fact, MPA will only reduce the recidivism of a particular group of offenders. Therefore, while chemical treatment for sex offenders should be offered by the states, none of the current statutes in force authorizes the treatment in a manner that satisfactorily avoids harmful consequences to both the sex offenders who may receive treatment and the society of which these offenders will be a part. Each of the states with current statutes should amend these to increase the chances of successful implementation, and states considering similar laws should consider drafting legislation for the primary purpose of providing treatment rather than inflicting societal retribution.

205 William Winslade et al., supra at 366-367.

206 See, Beth Miller, supra at 45, 53.